IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1982, TERM

NO. 82-6990

DERICK LYNN PETERSON,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Since the time the Petitioner, Derick Peterson, filed his Petition for a Writ of Certiorari, this Court announced opinions dealing with, or impacting on, the issues raised in the Petition, Zant v. Stephens, _____ U.S. _____, 51 U.S.L.W. 4891; California v. Ramos, _____ U.S. _____, 51 U.S.L.W. 5220; Solem v. Helm, _____ U.S. _____, 51 U.S.L.W. 5019. Pursuant to Rule 22.6, Rules of the Supreme Court, this Supplemental Brief is being filed to discuss those decisions and how they affect the issues now pending before the Court in this case. The topics will be discussed in the same order as in the Petition for a Writ of Certiorari.

A. THE TRIAL COURT, BY REFUSING TO RESPOND TO THE JURY'S QUESTION ABOUT THE POSSIBILITY OF A LIFE SENTENCE WITHOUT PAROLE FOR PETITIONER'S CAPITAL MURDER, RESTRICTED THE JURY'S CONSIDERATION OF ANY FACTOR IN MITIGATION OF THE DEATH SENTENCE, AS REQUIRED BY LOCKETT v. OHIO.

On July 6, 1983, this Court decided California v. Ramos, supra, in which it was held that the Eighth and Fourteenth Amendments of the United States Constitution did not prohibit the State of California from requiring that juries in capital cases

be instructed that the governor has the power to commute a life sentence. This Court noted that life imprisonment without the possibility of parole was a sentencing option which the jury had and of which they were told, and the instruction merely gave them accurate information to dispel any "possible misunderstanding" about that sentencing alternative, id. at 5224, fn. 19. The Court again cited with approval Gregg v. Georgia, 428 U.S. 153, 204 (1976): "We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision," California v. Ramos, 51 U.S.L.W. at 5225, fn. 23. The same concern pervades this Court's opinion in Zant v. Stephens, supra.

As was pointed out in the Petition, Virginia Code §53.1-151 provides that a defendant receiving, for the first time, a single life sentence is not eligible for parole until after serving fifteen years and that a defendant receiving two or more life sentences is not eligible for parole until after serving twenty years. Peterson's counsel argued that the jury should have been told that Peterson, by virtue of having received three life sentences for three separate and distinct crimes, could in fact have gotten life imprisonment without the possibility of parole pursuant to a change in Virginia Code §53.1-151 effective after the date Peterson committed the capital murder which is the subject of the Petition and this Supplemental Brief and other crimes. Before the Virginia Supreme Court, the Commonwealth argued that a sentence of life imprisonment without the possibility of parole based upon a crime committed prior to the date the statute authorizing such a punishment was effective would violate the Constitution's ex post facto clause, Brief of Appellee, pp. 8ff. Even asssuming that the Commonwealth is correct, the jury could nonetheless have been told about the

minimum time Petitioner would be incarcerated before he would be eligible for parole.

If California may require juries to be told about the possibility of commutation of a sentence of life imprisonment by the governor, with the "wide-ranging evidence" which this Court has endorsed in capital sentencing proceedings, the much firmer prospect of Peterson's incarceration for a considerable period of years should have been brought to the attention of the jury. Indeed, California v. Ramos, says so, id. at 5224, fn. 19:

> ....Further, the defendant may offer evidence or argument regarding the commutation power....

That the jury should have been informed of the long length of time that would elapse before Petitioner would be eligible for parole is also buttressed by this Court's reasoning in California v. Ramos that consideration of a life sentence involves jury consideration of a defendant's future dangerousness. It was solely upon the Petitioner's future dangerousness as perceived by the jury that that body recommended a death sentence. Proper jury information about the true consequences of a life sentence therefore became even more critical in the protection of Petitioner's Constitutional rights.

Further, California v. Ramos evidences this Court's concern that the information a jury receive in the course of a capital sentencing procedure be full, accurate and not misleading. The information the jury received was certainly not full and, indeed, did nothing to eliminate the jury's likely misconception that the Petitioner would be paroled within a relatively short period of time. In this sense, the information the jury received --or, more accurately, did not receive -- failed to dispel the misunderstanding which causes this issue to arise, in this and other cases. Obviously, the jury was considering a life sentence

for Petitioner on his capital murder conviction, and might well have given him such a sentence if they had been adequately instructed on the true effects of parole on a life sentence.

However, to rule that Petitioner is entitled that the jury be informed as he here argues does not require this Court to rule that the prosecution might offer such evidence or the conditions under which it might do so. It is only necessary to rule that Petitioner has the right to have the jury so informed on the basis of the clear authority of Lockett v. Ohio, 438 U.S. 586, (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982).

There is a conceptual difference, recognized in California v. Ramos, between a state's offer of evidence during a capital sentencing proceeding and what a defendant may choose to offer under Lockett and Eddings, supra. That a defendant may offer evidence and/or argument regarding parole is made clear from that portion of fn. 19 of California v. Ramos, quoted above and also the portion of the same footnote which follows:

> We note further that respondent (Ramos) does not, and indeed could not, contend that the California sentencing scheme violates the directive of Lockett of Ohio, 438 U.S. 586 (1978). The California statute in question permits the defendant to present any evidence to show that a penalty less than death is appropriate in his case. (Citation to California Penal Code omitted)

The Commonwealth, relying on California v. Ramos, contends that state law, not federal Constitutional law, governs the questions of whether and to what extent juries should be allowed to consider commutation or parole (Brief in Opposition to Petition, p.8). The Petitioner disagrees: in the circumstances of this case it is a Lockett question.

8. THE TRIAL COURT, IN ADMITTING INTO EVIDENCE A REMARK MADE BY A WITNESS FOR THE COMMONWEALTH ALLEGEDLY MADE TO HER BY THE PETITIONER AT A PRELIMINARY HEARING ON ANOTHER CHARGE, VIOLATED PETITIONER'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO HAVE THE JURY FIX HIS SENTENCE IN LIGHT OF CLEAR, ASCERTAINABLE STANDARDS.

During the penalty phase of Petitioner's trial, the Commonwealth introduced Gerrie Anne Baize, an employee of Family Dollar Stores in Hampton, Virginia. She testified to a robbery committed by Petitioner which occurred February 8, 1982, the day after the incident which resulted in Petitioner's capital murder conviction. She testified, among other matters, that at the preliminary hearing arising out of the February 8, 1982, incident, Petitioner told her after she testified against him "I will remember you, and I'm going to get you, you mother fucker".

Zant v. Stephens, supra, might be seen as supporting the Commonwealth's argument that such evidence was properly admitted, but only if this Court should construe Zant as standing for the proposition that any evidence, no matter of what kind or nature, should be admitted during the sentencing phase of a capital trial if it relates to the crime or the defendant. That this is not the case, and that Zant has some limitations, is evident from its citation of Gregg v. Georgia, supra at 203-204, where it was declared that "the evidence introduced and the arguments made at the presentence hearing (should) not prejudice a defendant," Zant, supra at 4897.

It is one thing to admit evidence, wide ranging though it may be, pertaining to the crime for which a jury is deliberating on a death sentence or touching objective, measurable symptoms of a defendant's future dangerousness. It is quite another to admit angry words. In the first place, everybody at one time or another has utilized harsh words. Secondly, no evidence was offered by the Commonwealth -- and, indeed, the Commonwealth did

not even attempt to offer -- any evidence to show a correlation, if any correlation exists, between such harsh words and Petitioner's supposed penchant for future violence. Further, Peterson's jury was not instructed as to what weight to give such evidence or what otherwise to make of it. It was more prejudicial than probative.

C. THE VIRGINIA SUPREME COURT, IN CONDUCTING A PROPORTIONALITY REVIEW OF PETITIONER'S DEATH SENTENCE, UNCONSTITUTIONALLY RESTRICTS ITS REVIEW TO CASES IN WHICH THE DEATH PENALTY IS ACTUALLY IMPOSED.

There is now pending before this Court Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), cert. granted 51 U.S.L.W. 3684 (1983). The questions which this Court will consider in Harris are, in essence:

> 1. Does the Constitution, in addition to procedures whereby the trial court or jury impose the death sentence, require any specific form of proportionality review, by a court of statewide jurisdiction prior to execution of a state death judgment?
>
> 2. If so, what is the Constitutionally required focus, scope and procedural structure of such review?

The importance of proportionality review was emphasized in Zant v. Stephens, supra at 4898, where this Court noted that:

> Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality....

It was further noted that the proportionality review conducted by the Georgia Supreme Court encompassed not only cases in which the death penalty was imposed, but similar cases in which death was not imposed, id. at 4895, fn. 19.

Petitioner contends that in his case the Virginia Supreme

Court reviewed only cases in which the death penalty was imposed, and not other cases in which a defendant may have been charged with capital murder but received only a life sentence. The Commonwealth contends at page 11 of its Brief in Opposition that the Virginia Supreme Court does not restrict its review to only those cases in which the death penalty has been imposed. To agree with the Commonwealth is to read into the opinion of the Virginia Supreme Court in Petitioner's case, pp. 12-14, something which is not there. The only cases which are compared with Peterson's are those in which the death sentence was imposed. There is no statement in the opinion by the Virginia Supreme Court from which this Court can reasonably conclude that the Virginia Supreme Court considered cases other than those in which the death penalty had been imposed.

The Virginia Supreme Court has occasionally compared death sentences with capital murders in which the death sentence was not imposed. When it has done so, it has said so, and its failure to say so in the Peterson opinion leads one to the inescapable conclusion that the Court relied only on capital murder cases in which death sentences were imposed to support the death sentence for Peterson. Thus, in Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808, cert. den., 445 U.S. 972 (1979), the Court compared Stamper's conduct with that of a co-defendant. The same was true in Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979) cert. den., 444 U.S. 1103.

With the exception of Stamper, in none of the cases relied on by the Virginia Supreme Court to uphold the death sentence in this case is there any indication that the Court compared other cases involving capital murders in which the death sentence was not imposed. Evans v. Commonwealth, 222 Va. 766, 284 S.E.2d 816 (1981), cert. den. 455 U.S. 1038 (1982); Bassett v. Commonwealth, 222 Va. 844, 284 S.E.2d 844 (1981), cert. den.,

456 U.S. 938 (1982); Giarratano v. Commonwealth, 220 Va. 1064, 266 S.E.2d 94 (1980); Clanton v. Commonwealth, 223 Va. 41, 286 S.E.2d 172 (1982); Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), cert. den. 451 U.S. 1011; James Dryal Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980); Linwood Earl Briley v. Commonealth, 221 Va. 532, 273 S.E.2d 48 (1980), cert. den. 451 U.S. 1031 (1981); Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643 (1982), cert. den., _____ U.S. _____, 103 S.Ct. 1280, 75 L.Ed.2d 501 (1983). It is interesting that in Turner, 273 S.E.2d at 47, the Court noted that it examined the capital murder cases it had "reviewed" since Virginia Code §17-110.1(c) was enacted, focusing on cases in which death sentences had been imposed for murder in the commission of a robbery. Virginia Code §17-110.1(c) provides for automatic review by the Virginia Supreme Court of cases in which the death penalty has been imposed. In Evans, supra, a capital murder arising out of the killing of a law enforcement officer, the Court admitted it had no comparable case to determine whether or not Evans' death sentence was excessive or disproportionate, and looked instead to cases which made the death penalty mandatory for the killing of a law enforcement officer or which involved death sentences imposed for the killing of such an officer.

LeVasseur v. Commonwealth, 225 Va. _____, 304 S.E.2d 644 (1983), a case recently decided by the Virginia Supreme Court, shows that this trend continues. The Court noted it had examined the records "in all the capital murder cases reviewed by this Court, taking particular note of the facts in which juries imposed capital punishment solely on the basis of the 'vileness' predicate" (that being the aggravating circumstance on which the jury recommended the death sentence).

Virginia Code §17-110.1(c) does not require the Supreme

Court to accumulate records of capital felonies, but says it "may" accumulate such records within such period of time as it may determine and shall consider such records "as are available" in determining whether the sentence under review is excessive. It is obvious this imposes no real duty on the Virginia Supreme Court.

After this Court's decision in Solem v. Helm, supra, it is apparent that the Virginia Supreme Court's proportionality review is defective in another respect. The Virginia Supreme Court, in deciding whether a death sentence in any particular case is excessive or disproportionate, considers only cases tried in the Commonwealth of Virginia. In Solem, supra at 5023, this Court declared not only that a court in conducting its proportionality analysis, could, but should, review "the sentences imposed for commission of the same crime in other jurisdictions." If such a proportionality analysis ought to be conducted in cases involving only imprisonment, it ought doubly to be conducted when a defendant's life is at stake. Cases involving convictions of capital murder when either death or lesser authorized punishments are imposed form a relatively narrow class. The aggravating circumstances which make a defendant eligible for the death penalty will be, on a nationwide basis, relatively few and, at the same time, will be similar from state to state. There is a tendency of states to borrow capital punishment statutes from other states (such as Virginia did after the capital punishment procedures in Georgia and Texas were upheld by this Court in Gregg v. Georgia, supra, and Jurek v. Texas, 428 U.S. 262 [1976]). For these reasons, appellate review of capital murder cases in other states, both those in which death is imposed and those in which it is not, is particularly appropriate.

CONCLUSION

For the reasons stated herein and in the Petition for Writ of Certiorari heretofore filed, Petitioner prays that this Court issue a writ of certiorari.

DERICK LYNN PETERSON

By _____
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that I mailed a true copy of the foregoing to Richard B. Smith, Assistant Attorney General, Criminal Law Enforcement Division, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia, 23219, Counsel for Appellee, this 16 th day of September, 1983.

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